Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

October Term, 1998

MICHAEL BURNS

Petitioner,

v.

STATE OF ARIZONA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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June 1999

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QUESTION PRESENTED

The lower courts below upheld a conviction based upon warrantless taking of sample of Michael Burns' blood by Phoenix Police Officer who made no attempt to obtain a search warrant, that could have been obtained a with no loss or dissipation of alcohol concentration evidence.

Did the courts below erred in admitting blood test results under the exigent circumstances exception to the Fourth Amendment as enunciated *Schmerber v. California* where a telephonic warrant was available and there was no showing by the state that a loss of evidence would have resulted from the time delay to obtain a warrant.

The second question presented is whether the exigent circumstances exception to the Fourth Amendment should be drawn more narrowly, in light of availability of the state to obtain telephonic warrants by modern telephonic and the admissibility of scientific retrograde extrapolation evidence determining blood alcohol content to minimum of three hours prior to drawing blood.

TABLE OF AUTHORITIES

Cases:

Federal:

Schmerber v. California, 284 U.S. 757, ... 10, 11, 12 16,

United States v. Pond, 36 M.J. 1050, (U.S. Air Force Ct. of Military Rev. 1993), ... 16

State:

State of Arizona v. Flannigan, 281 Ariz. Adv. Rep.30 (11-03-98), ... 15, 16, 17

State v Moylett, 836 P.2d 1329 (Oregon 1992), ... 15

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Constitutional Provisions, Statutes and Rules

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Ariz. Rev. Stat., 28 § 697 (A)(1), ... 7

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PETITION FOR A WRIT OF CERTIORARI

Michael Burns respectfully petitions for a writ of certiorari to review final judgment of the Supreme Court of the State of Arizona in this criminal case.

OPINIONS BELOW

On April 12, 1999, the Supreme Court of the State of Arizona denied Michael Burns' Motion for Reconsideration (App. A-2). On March 18, 1999, the Supreme Court of the State of Arizona granted a Motion for Leave to File Motion to Reconsider and filed the Motion for Reconsideration with the Court (APP. A-3). On February 18, 1999, the Supreme Court of the State of Arizona denied Michael Burns' Petition for Review of judgment of guilt App. A-4).

The decision of the Arizona Court of Appeals, Division One on the merits is not reported. The Court of Appeals issued an unpublished Memorandum Decision (App 5 -10). The decision of the Superior Court of Arizona in and for Maricopa

County is unreported. The trial court denied to Defendant's Motion to Suppress on the record (App 12-13).

JURISDICTION

The Supreme Court of Arizona entered its final order denying Defendant's Motion for Reconsideration on April 12, 1999. The jurisdiction of this Court to review final decision of the Arizona Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment IV.

Former A.R.S. 28-691, which was in effect in 1995, provided for implied consent of every driver in Arizona to tests of a sample of his or her breath, blood, or urine if law enforcement officers arrested an individual for operating a motor vehicle under influence of alcoholic beverage. It also provided for suspension of the driving privilege of individual refusing the test for twelve months

Former A.R.S. 28-692(j) further provided that if blood sample of any individual is being drawn by any medical personnel for medical purposes that the police, upon request, are entitled to receive another sample of blood regardless of the patient's consent or refusal.

STATEMENT OF THE CASE

1. Statement of Facts.

On August 18, 1995, the Phoenix Police Department received a report that a vehicle struck a utility pole at intersection of North 17th Avenue and Coolidge in Phoenix,

Arizona. Phoenix Police Officer Remsik responded to the call. Officer Remsik arrived and saw Michael Burns pinned behind steering wheel of the car. Paramedics removed Burns from the car and transported him to Saint Joseph's Hospital. The Officer followed the ambulance taking Mr. Burns to the Saint. Joseph's Emergency Room. A stipulation of parties established Mr. Burns was conscious and aware of his surroundings at hospital. Officer Remsik did not ask Mr. Burns at any time to provide a sample of his blood, breath, or urine pursuant to former A.R.S. 28-691, the former Arizona implied consent statute.

Officer Remsik made no attempt whatsoever to obtain telephonic search warrant for a sample of Mr. Burns' blood. Officer Remsik observed medical personnel taking a sample of Mr. Burns' blood and requested a blood sample for police use. The sample of Mr. Burns' blood was taken twenty-five minutes after the accident. Officer Remsik remained at the

hospital until such time as Mr. Burns was admitted for treatment of severe injuries he received in the collision.

The record is void of evidence that Officer Remsik believed evidence of the Defendant's blood alcohol would be lost, if he took the time to obtain a telephonic search warrant. The policy of the Phoenix Police Department for obtaining telephonic search warrants is to obtain a telephonic search warrant only in cases that involving death or serious physical injury. In cases where no person is in a life-threatening situation, Phoenix Police Departmental policy is to ask the medical technician for a sample of blood, if a sample is being drawn for any medical purpose.

The chemical analysis of Mr. Burns' blood sample resulted in finding of blood alcohol concentration (BAC) of 0.16. This was admitted into evidence at trial.

2. Initial Maricopa County Superior Court Proceedings

On August 23, 1996, an evidentiary hearing was held on a Motion to Suppress the results of the chemical analysis

of Mr. Burns' blood sample. The suppression hearing was the first instance in which the federal questions to be reviewed were raised. At the hearing, defense counsel argued there were no exigent circumstances to justify a warrantless search because there was sufficient time for Officer Remsik to obtain telephonic warrant, without loss of blood alcohol evidence of driving under the influence of alcohol. The Phoenix Police Department had a functioning procedure for obtaining telephonic warrants in cases the department deemed necessary. There was no proof offer by the state or any finding that blood alcohol evidence would be contaminated or lost before a warrant could be obtained. Mr. Burns was seriously injured, and confined for treatment at the hospital. Therefore, there was no possibility of blood alcohol evidence being lost. According to unrefuted expert testimony of criminalist Chester Flaxmeyer, if Mr. Burns' blood alcohol were .10 at the time of driving, any blood sample taken within three hours of the driving could be used

analysis. The police department for the City of Scottsdale, a municipality immediately adjoining the City of Phoenix, routinely uses telephonic search warrants to obtain blood samples for subsequent analysis. The search warrants and blood are obtained within two hours of the time of driving.

The court denied the Motion to Suppress (App. 11-12) and subsequent Motion and Motion for Reconsideration (App. 13-14) both of which raised the question of applicability of the Fourth Amendment's warrants requirement; and inapplicability of an exigent circumstance exception.

On March 26, 1997, Mr. Burns was found guilty by a bench trial before Judge Yarnell of having violated the aggravated DUI statute, A.R.S. 28-692(A)(1) and 28-697(A)(1), by having blood alcohol content (BAC) above .10 within two hours of the time of driving.

3. Arizona Court of Appeals Decision.

On June 18, 1999, the Arizona Court of Appeals (Division One) affirmed conviction of Mr. Burns. The Court of Appeals

reasoned that all that was necessary to supply exigent circumstances to justify a warrantless search was probable cause and a search for blood alcohol. The evanescent nature of blood alcohol supplied the exigent circumstances. The availability or necessity of showing that a search warrant could not be obtained in time to prevent the loss was held not to be a factor in determining exigent circumstances.

4. Supreme Court of the State of Arizona Decision.

On February 18, 1999, the Arizona Supreme Court denied Mr. Burns' Petition for Review in this case. Mr. Burns filed a Motion for Leave to File motion for Reconsideration which was granted on March 18, 1999. On April 14, 1999, the Arizona Supreme Court denied Motion for Reconsideration of the case.

REASONS FOR GRANTING WRIT

This case involves the warrantless seizure of the Defendant's blood sample. Mr. Burns raises the question of

REASONS FOR GRANTING WRIT

This case involves the warrantless seizure of the Defendant's blood sample. Mr. Burns raises the question of exigent circumstances existing when telephonic search warrant procedures were available to the police and courts are available to review the officer's belief of probable cause. Mr. Burns challenges the existence of exigent circumstances when no showing was made by the state that the police officer reasonably believed that obtaining a search warrant would result in the loss of evidence. Under these circumstances the taking Mr. Burns blood and the use of evidence obtained therefrom result in a violation of the protection afforded to Mr. Burns by the Fourth and Fourteenth Amendments to the United States Constitution.

The warrantless blood sample was used to convict the Defendant of the offense of driving under the influence of intoxicating liquor. The obtaining of a blood sample for use by the prosecution in a driving under the influence case may

reasonably be said to be by the far the most frequent contact citizens have with the criminal justice system and the protections provided by the Constitution. The great number of incidents in which these protections effect citizens is a basic reason for this Court to carefully define any exception to the protected constitutional right.

In this case, the lower courts uniformly misapplied the "exigent circumstances" exception to obtaining a written warrant set forth in *Schmerber v. California*, 284 U.S. 757 at 767 (1966). The uniformity with which this exception was misapplied is indicative of the need for this Court to redefine scope of a so-called exigency exception especially in view of availability of modern technology providing police with ready access to judges and the use telephonic search warrants. Consideration must be required to be given to available and commonly accepted scientific procedures extending the time period in which a blood sample may be obtained that will

provide relevant admissible evidence of the defendant's blood alcohol at a prior time.

In the present case, the lower courts misinterpreted *Schmerber v. California*, 284 U.S. 757 (1966) to permit the warrantless search and seizure of Mr. Burns' blood solely because of the evanescent nature of blood alcohol. This Court should grant writ of certiorari to correct this error. The erroneous application of the exigent circumstance exception denied Mr. Burns his constitutional protection against unreasonable search and seizure under the Fourth Amendment. Mr. Burns had the right not to have a blood sample extracted from his body without warrant because the requirements for application of the "special" exigent circumstances exception set forth in *Schmerber*, were not met in his case.

Schmerber held the warrantless taking of blood did not violate the Fourth Amendment when "special" exigent circumstances existed. The exigent circumstances were not only the evanescent quality of alcohol in the blood, but also the

"reasonable" belief by the police there was not sufficient time to "seek out a magistrate and secure a warrant" before evidence of defendant's intoxication would be lost or destroyed.

Although *Schmerber* was decided more than thirty years ago, its principles are as valid now as then. The basis of the decision is the Police Officer's reasonable belief that evidence of a crime would be lost if the time were taken to obtain a search warrant. The nature of the evidence sought, such as alcohol, is not and has never been the sole controlling factor. It is only one factor. The controlling justification was a reasonable belief that the evidence will be lost by the time a warrant was obtained. To justify a warrantless search it is incumbent on the prosecution to show that the police officer believed that the evidence would be lost if the time were taken to obtain a warrant. The availability of telephonic search warrants to obtain the blood sample, a common procedure in the United States in 1999, is a factor effecting a reasonable belief that evidence will or will not be lost.

Availability of scientific retrograde analyses of the blood samples obtained by search warrant is another critical factor in determining a reasonable belief that evidence of blood alcohol content at a previous time will be lost. The police cannot be willfully blind to the use of these newer law enforcement tools. In the present case telephonic warrants were available, however, as a matter of policy were only utilized in circumstances involving serious injury. Scientific evidence capable of extrapolating blood alcohol content to a previous time was available and routinely admitted in evidence. There was no showing that the Officer Remsik reasonably believed that evidence of blood alcohol would be lost if he took the time to obtain a warrant. Officer Remsik saw the medical personnel taking blood and requested a sample for police use. The medical personnel complied. These are not exigent circumstances. Officer Remsik had available a telephone and was aware of the procedures to obtain a telephonic search warrant. Scientific evidence of the analysis of a blood alcohol

sample can be extrapolated to provide evidence of the blood alcohol content at a prior time. There is no showing that the evidence could not have been timely obtained because no effort was made to obtain a warrant. Likewise there is no evidence that Officer Remsik had a reasonable belief that the evidence would be lost if he took the time to obtain a warrant. The exigent circumstances exception to requirement that a warrant need be obtained to conduct a search may not be created by not thinking about whether or not a warrant can be timely obtained or ignoring the modern resources supplied to law enforcement to obtain evidence.

In this case, there are three other reasons why petition for certiorari should be granted. First, there is conflicting authority, even within Arizona, on whether the exigent circumstances exception to the warrants requirement of the Constitution exists, where there was time sufficient to obtain telephonic warrant with no loss of evidence in criminal cases, even within the same Arizona Court of Appeals (Division

One). See *State of Arizona v. Flannigan*, 281 Ariz. Adv. Rep.30 (11-03-98)(holding no exigent circumstances existed where Mesa police officer could have obtained telephonic warrant within fifteen to forty-five minutes, with no consequent loss of blood sample or evidence).; and *State v Moylett*, 836 P.2d 1329 (Oregon 1992)(holding no exigent circumstances where officer could obtain telephonic warrant promptly, with no loss or dissipation of evidence in the case).

The protection provided by the warrants clause of the Fourth Amendment as with all constitutional protections do not change depending upon how the criminal conduct is charged. A criminal charge under Arizona Criminal Code (vehicular manslaughter); and a charge of aggravated driving under influence case under Arizona Motor Vehicle Code (DUI) afford the accused identical constitutional protection.

The statement by the Arizona Court of Appeals in its unpublished opinion in this case, that "no other jurisdiction appears to have adopted the reasoning in Moylett" is incorrect.

In *Flannigan*, the Arizona Court of Appeals, Division One, refused to find exigent circumstances existed where Mesa police officers could have obtained a telephonic warrant in as little as fifteen minutes, with no loss or dissipation of evidence as result of obtaining the warrant. See, *State v. Flannigan.*, 281 Ariz. Adv. Rep. 30, 34 and at fn. 4 ("for cases applying similar fact-intensive applications of *Schmerber*. . . and likewise finding no exigent circumstances, see *State v. Jones*, 895 P.2d 643 644 (Nevada 1995); *United States v. Pond*, 36 M.J. 1050,1058-59 (U.S. Air Force Ct. of Military Rev. 1993); *State v. Moylett*, 836 P.2d 1329, 1335-36 (Oregon 1992)."

The Arizona Court of Appeals erred in holding the burden is upon Mr. Burns to prove the "efficacy" of obtaining a speedy telephonic warrant in this case. The burden of proof is not upon Mr. Burns to "demonstrate the efficacy of obtaining a telephonic warrant," as condition precedent to applicability of the warrants requirement of the Fourth Amendment of the United States Constitution. In this case, as in *State v.*

Flannigan, 281 Ariz. Adv. Rep 30, 33 (1998). When the state seeks to avoid the application of a constitutional protection the burden is upon the state to show why. Constitutional protections must be assumed to apply in all cases absent a showing that they do not. The burden is on the state to prove they do not. The prosecution did not meet its burden of proving the presence of the exception by way of the exigent circumstances exception.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

October Term, 1998

MICHAEL BURNS

Petitioner,

v.

STATE OF ARIZONA

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

Supreme Court State of Arizona Letter Head

April 14, 1999

RE: STATE OF ARIZONA VS. MICHAEL BURNS
Supreme Court No. CR –98-0365-PR
Court of Appeals No. 1 CA-CR 97-0405
Maricopa County No. CR 96-03084

GREETING:

The following action was taken by the Supreme Court of the State of Arizona on April 12, 1999, in regard to thew above-reference cause:

ORDERED: Motion for Reconsideration = DENIED.

NOEL K. DESSAINT, Clerk

TO:

Janet Napolitano, Attorney General
Attn: Paul J. McMurdie, Esq, and Katia Mehu, Esq.
Dean W. Trebesch, Maricopa County Public Defendant
Attn: Steven R. Collins, Esq.
Michael Burns

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SUPREME COURT OF ARIZONA

STATE OF ARIZONA	)	Supreme Court
	)	No. CR-98-0365-PR
Appellee,	)	
	)	Court of Appeals
v.	)	No. 1 CA-CR 97-0740
	)	
MICHAEL BURNS,	)	Maricopa County
	)	No. CR 96-03084
Appellant.	)	
	)	ORDER

A "Motion for Leave to File Motion to Reconsider" having been filed by Appellant Burns, Pro Se, and no objection have been received,

IT IS ORDERED granting the Motion for Leave to File Motion to Reconsider. The Clerk shall file the Motion for Reconsideration.

DATED this the 18th day of March, 1999.

/s/ Charles E. Jones
CHARLES E. JONES
Vice Chief Justice

TO:

Janet Napolitano, Attorney General
Attn: Paul J. McMurdie, Esq, and Katia Mehu, Esq.
Dean W. Trebesch, Maricopa County Public Defendant
Attn: Steven R. Collins, Esq.
Michael Burns
cb

Supreme Court State of Arizona Letter Head

February 19, 1999

RE: STATE OF ARIZONA VS. MICHAEL BURNS

Supreme Court No. CR –98-0365-PR

Court of Appeals No. 1 CA-CR 97-0405

Maricopa County No. CR 96-03084

GREETING:

The following action was taken by the Supreme Court of the State of Arizona on February 18, 1999, in regard to thew above-reference cause:

ORDERED: Appellant's Petition for Review = DENIED.

A panel composed of Chief Justice Zlaket, Justice Martone, and Justice McGregor participated in the determination of this matter.

Record returned to the Court of Appeals, Division One, Phoenix, the 18th day of February, 1999.

NOEL K. DESSAINT, Clerk

TO:

Janet Napolitano, Attorney General

Attn: Paul J. McMurdie, Esq, and Katia Mehu, Esq.

Dean W. Trebesch, Maricopa County Public Defendant

Attn: Steven R. Collins, Esq.

Michael Burns

Glen D. Clark, Clerk Court of Appeals Division One Phoenix

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA Appellee, v. MICHAEL BURNS, Appellant.	)	No. 1 CA-CR 97-0740 DEPARTMENT B MEMORANDUM DECISION (Not for Publication Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior court of Maricopa County
Cause No. CR 96-03084
The Honorable Michael A. Yarnell, Judge
AFFIRMED

GRANT WOODS, ATTORNEY GENERAL
By Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Katie Mehu, Assistant Attorney General
Attorneys for Appellee
Phoenix
DEAN W. TREBESCH, Maricopa County Public Defender
by Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant
Phoenix

E H R L I C H, Judge

Michael Burns ("defendant") appeals from his conviction and sentence for aggravated driving while under the influence of intoxicating liquor ("DUI") with a blood alcohol concentration ("BAC") of .10 percent or more, a class 4 felony under former ARIZ. REV. SAT. ANN ("A.R.S.") sections 28-697(A)(1) and 28-692(A)(1)(recodified as A.R.S. sections 28-1381(A)(1) and (2)). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The defendant drove his car into a utility pole and was transported by paramedics to a Phoenix hospital. There, a police officer noticed "a strong odor of alcohol coming from the area where [the defendant] was on the gurney. . . ."

A hospital technician drew a sample of the defendant's blood for medical purposes approximately 25 minutes after the accident. Although the defendant was conscious, he was "very incoherent." Thus the officer was unable to obtain an intelligent waiver for a blood- or breath-alcohol test. Instead, having seen that blood was being drawn, the officer asked for and received two vials of the defendant's blood for investigative purposes. Subsequent testing of the sample disclosed a BAC of .16 percent.

The defendant was charged with aggravated DUI in violation of A.R.S. 28-692(A)(1)(Count 1) and aggravated DUI with a blood alcohol content of .10 percent or more in violation of A.R.S. section28-692(A)(2)(Count 2). It was alleged that he was driving while his driver's license had been suspended or

revoked. After waiving his right to trial by jury and submitting the case to the trial court upon the record, the defendant moved for a judgment of acquittal pursuant to ARIZ. R. CRIM. P. 20(a), which the court denied.

The trial court found the defendant not guilty of Count 1 and guilty of Count 2. It suspended the imposition of sentence and placed the defendant on probation for four years. As a term of probation, the defendant was committed to the Arizona Department of Corrections for four months with credit for one day previously served. The defendant appealed, raising issues concerning the admissibility of his blood test and the denial of his motion for judgment of acquittal.

DISCUSSION

1. Admissibility of Blood-Test results

The defendant asserted in an unsuccessful motion to suppress the blood-test results that the circumstances in which the police obtained a sample of his blood violated his constitutional right to be free from unreasonable searches and seizures. He advances this issue now on appeal.

Relying on *Schmerber v. California*, 384 U.S. 757, 770-71 (1966), the Arizona Supreme Court held in *State v. Cocio*, 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985), that a warrantless removal of blood from a person is permissible when (1) probable cause exists to believe that the person has violated the DUI law, (2) exigent circumstances are present and (3) the blood is drawn

for medical purposes by medical personnel. All of these criteria are satisfied here: the trial court's finding of probable cause is unchallenged. Time was of the essence. See *Cocio*, 147 Ariz. At 286, 709 P.2d at 1345 ("In such a situation exigent circumstances permit a warrantless seizure because, '. . . the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system') (quoting *Schmerber*, 384 U.S. at 770). A hospital technician drew the blood for medical purposes; that the police obtained a portion of the sample after it was taken was incidental to an intrusion upon the defendant's privacy. Id. At 287, 709 P.2d at 1346 ("The bodily intrusion of the needle was performed at the doctor's request for medical purposes. No additional needle puncture was required, and no additional trauma, pain or interference with the medical treatment of defendant was involved.").

The defendant cites *State v. Moylett*, 836 P.2d 1320 (Oregon, 1992), for the proposition that blood-test results must be suppressed under similar facts if the police could have obtained a telephonic search warrant. We reject this authority for three reasons: First, unlike *Cocio*, *Moylett* is not binding upon this court. *See State v. Anderson*, 185 Ariz. 454, 456, 916 P.2d 1170, 1172 (Ariz. App. 1996)(Court of Appeals bond by decisions of Arizona Supreme Court). Second, unlike the

defendant in *Moylett*, this defendant did not demonstrate the efficacy of obtaining a telephonic warrant. Third, no other jurisdiction seems to have adopted the reasoning in *Moylett*. Rather, courts other than the Arizona Supreme Court have held that warrantless, involuntary blood draws are constitutional when the state can establish probable cause that the defendant was driving while intoxicated citing *Schmerber*. *E.g.*, *State v. Nielson*, 530 N.W.2d 212, 214 (Minn. App. 1995) (consent/warrant unnecessary when officer has probable cause to believe defendant DUI); *Bell v. State*, 881 S.W.2d 794, 801 (Tex. App. 1994)(warrantless, involuntary taking of defendant's blood does not violate Fourth Amendment when there is danger of alcohol dissipating from blood before evidence could be gathered and police have probable cause to believe defendant committed alcohol-related offense); *State v. LeRette*, 858 S.W.2d 816, 818-19 (Mo. App. 1993)(warrantless seizure of blood sample permissible given probable cause and fact that evidence of intoxication dissipates promptly).

The trial court correctly ruled that the results of the defendant's blood tests were admissible.

2. Motion for Judgment of Acquittal

The defendant moved for acquittal pursuant to ARIZ. R. CRIM. P. 20(a), alleging that the state had failed to establish that his license had been revoked pursuant to the subsections of the statute set forth in the information charging him. The

information alleged that the defendant committed the offense while his driver's license "was suspended, cancelled, revoked or Refused, or restricted as a result of violating A.R.S. 28-692 or 28-694." However, the license was suspended under former A.R.S. section 28-691 (Supp. 1995)(the "implied consent statute").[1] The defendant contends that his conviction must be vacated because the state failed to prove a suspension under A.R.S. section 28-692 or section 28-694. We reject this argument for several reasons.

First, the statute does not support the defendant's implicit assumption that the state had to prove a prior violation of A.R.S. section 28-692 or section 28-694 to establish its case. The statute required the state to prove that the defendant's license was "suspended, cancelled, revoked or refused" "without regard to the reason for the suspension or revocation." State v. Pitts, 178 Ariz. 405, 407, 874 P.2d 692, 964 (1994); see State v. Gin, 158 Ariz. 202, 204, 761 P.2d 1106, 1108 (App. 1988)(basis for suspension "irrelevant and could have resulted from any number of circumstances.")

---

1 Now A.R.S. section 28-1321 (1998). The implied consent statute imposes a twelve month suspension of an arrested driver's license in the event that he refuses to consent to a blood, breath or urine test for the purpose of determining blood alcohol concentration. A.R.S. Section 28-1321(G)(3); see also former A.R.S. Section 28-691(F).

The State established that the defendant's license was suspended under former A.R.S. section 28-691 based on his refusal to consent to a BAC test. That is all that was necessary.

Second, any defect in charging was technical and could not have caused the defendant any prejudice. See ARIZ. R. CRIM. P. 13.5(b). He concedes that he knew of the suspension to which the state was referring in the information; his ability to defend was not affected. Under these circumstances, his conviction stands. See State v Jones, 188 Ariz. 534, 937 P.2d 1182, 1192 (App. 1996)(technical defect in indictment could not have prejudiced the defense).

Further, this is a case in which the information could be deemed amended to conform to the evidence because the amendment did not change the nature of the underlying crime. State v. Eastlack, 180 Ariz. 243, 258, 883 P.2d 999, 1014 (1994), cert. denied, 514 U.S. 1118 (1995). The defendant was charged with and convicted of the same underlying offense, aggravated DUI.

CONCLUSION

The conviction and sentence are affirmed.

_____

SUSAN A. EHRLICH, Presiding Judge

CONCURRING:

RUDOLPH J. GERBER, Judge

PHILIP E. TOCI, Chief Judge

State vs. Michael Burns

Superior Court of the State of Arizona Maricopa County

No. CR 96-03084

Extract of Trial Court's Decision of the Motion to Suppress

Reporters' Transcript of Proceeding August 23, 1996

Commencing on Page 72 line 17 to page 73 line 7:

THE COURT: Thank you, counsel.

I find that the State has met its burden of proof that there was probable cause to believe the suspect was driving under the influence before a sample of blood which was otherwise taken for medical purposes was requested, based on the evidence I have heard and based on the standard of proof being on the State and burden of proof being preponderance of the evidence.

I think you have a nice issue on the wording of the cases in terms of exigent circumstances being present.

Based on my understanding of the area of law. I find that standard is also me here in part based on statement in Schmerber - - I may not be saying that right.

MR. KAZAN: Schmerber.

THE COURT: Schmerber. - - that exigent circumstances include the fact that the percentage of alcohol in the blood begins to diminish shortly after drinking stops.

It really is a nice issue. I'm not persuaded, though, on the factual basis I've heard and the case law presented to me in

this case. I would be happy to reconsider the issue if you can find some more authority. If you find some direct authority in Arizona or other states with similar statutes or federal statutes that say something more than probable cause for DUI and alcohol which is inherently an alcohol – related situation is needed to demonstrate exigent circumstances referred to in the case, I certainly will reconsider.

MR. KAZAN: All right.

THE COURT: I understand your arguments. I think they have merit. I just disagree with them in terms of reading the case. I don't think that that is what the case means. But I certainly would be happy to be persuaded otherwise.

MR. KAZAN: I'll look into that, sir.

THE COURT: Anything further on this matter?

MR, KRAMER: Nothing from the State. Your Honor.

THE COURT: Let me make clear, then, the order is, and I don't know if I've said this, it is ordered denying the motion to suppress and motion to dismiss at this time based on this record.